No. 80-429

DEC 29 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION NATIONAL ASSOCIATION OF COUNTIES NATIONAL LEAGUE OF CITIES AND NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	7
CONGRESS DID NOT INTEND, IN ENACTING TITLE VII, TO INVEST THE FEDERAL COURTS WITH JURISDICTION TO DISSECT AND ANALYZE EMPLOYERS' PAY POLICIES IN SEARCH OF EXPLANATIONS FOR DIFFERENCES IN THE WAGES PAID TO MEN AND WOMEN PERFORMING DISSIMILAR JOBS	7
A. The Ninth Circuit's Opinion Circumvents the Will of Congress by Inviting Plaintiffs to Compare the Relative Components of Dissimilar Jobs as a Basis for Sex-Based Compensation Claims	8
B. The Equal Pay Act's Equal Work Standard was Congress' Specific Response to Complaints of Compensation Discrimination Against Women	15
C. The Ninth Circuit Erred When it Concluded that the Language of Title VII Necessarily Meant that Congress Intended to Expand the Law Applicable to Sex-based Compensation Claims	18
D. The Legislative History of Title VII Demonstrates that the Equal Work Standard was to be Applied to All Sex-based Compensation Claims	19
1. The Clark Memorandum	20
2. The Bennett Amendment	22
3. The Celler Statement	24

TABLE OF CONTENTS—Continued

Page

E. The Decisional Authority Demonstrates that Wage Discrimination Claims Under Title VII are Limited to Claims Which Satisfy the "Equal Work" Standard Developed by Congress Under the Equal Pay Act 25

F. The Potential Economic Consequences of the Ninth Circuit's Decision Clash With Congressional Intent 29

CONCLUSION 33

APPENDIX—Description of the Amici Curiae 1a

Equal Employment Advisory Council 1a

International Personnel Management Association.. 2a

National Association of Counties 2a

National League of Cities 3a

National Public Employer Labor Relations Association 3a

TABLE OF AUTHORITIES

CASES: Page

Ammons v. *Zia Co.*, 448 F.2d 117 (10th Cir. 1971).. 26
Angelo v. *Bacharach Instrument Co.*, 555 F.2d 1164 (3d Cir. 1977) 9, 32
Brennan v. *Prince William Hospital Corp.*, 503 F.2d 282 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975) 9
California Brewers Association v. *Bryant*, 100 S. Ct. 814 (1980) 13, 31
Chapman v. *Pacific Telephone & Telegraph Co.*, 456 F. Supp. 65 (N.D. Cal. 1978) 14
Christensen v. *Iowa*, 563 F.2d 353 (8th Cir. 1977).. 26, 31
Christopher v. *Iowa*, 559 F.2d 1135 (8th Cir. 1977) 9
Corning Glass Works v. *Brennan*, 417 U.S. 188 (1974) 4, 9, 10, 16, 17
Davis v. *City of Dallas*, 483 F. Supp. 54 (N.D. Tex. 1979) 28
Durant v. *Owens-Illinois Glass Co.*, 23 EPD ¶ 31,118 (E.D. La. 1980) 28
Franks v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) 24
Furnco Construction Corp. v. *Waters*, 438 U.S. 567 (1978) 13
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) 15, 21
Hilton v. *Wyman-Gordon Co.*, 624 F.2d 379 (3d Cir. 1980)..... 28
H.K. Porter Co. v. *NLRB*, 397 U.S. 99 (1970)..... 31
Horner v. *Mary Institute*, 21 FEP Cases 1069 (8th Cir. 1980) 9
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977) 13, 24
IUE v. *Westinghouse Electric Corp.*, 23 FEP Cases 588 (3d Cir. 1980), *pet for reh'g denied, pets. for cert. pending*, Nos. 80-781 & 80-944 ..... 7, 25
Kohne v. *Imco Container Co.*, 480 F. Supp. 1015 (W.D. Va. 1979)..... 7, 9

TABLE OF AUTHORITIES—Continued

	Page
Lemons v. *City & County of Denver*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3211 (U.S. Oct. 7, 1980) (No. 80-82)	26-27
Mazus v. *Department of Transportation*, 629 F.2d 870 (3d Cir. 1980)	28
National Woodwork Manufacturers Association v. *NLRB*, 386 U.S. 612 (1967)	6, 8
NLRB v. *Insurance Agents' International Union*, 361 U.S. 477 (1960)	31
Orr v. *Frank R. MacNeill & Son, Inc.*, 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975)	25
Patterson v. *Western Development Labs*, 13 FEP Cases 772 (N.D. Cal. 1976)	14
Radzanower v. *Touche Ross & Co.*, 426 U.S. 148 (1976)	5, 19
Shultz v. *First Victoria National Bank*, 420 F.2d 648 (5th Cir.), *pet. for reh'g en banc denied*, 420 F.2d 659 (5th Cir. 1969)	16
Shultz v. *Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970)	16, 32
United Air Lines, Inc. v. *Evans*, 431 U.S. 553 (1977)	24
United States v. *United Continental Tuna Corp.*, 425 U.S. 164 (1976)	19
United Steelworkers of America v. *Weber*, 433 U.S. 192, 99 S. Ct. 2721 (1979)	13
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)	5, 10
Willingham v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975)	20
STATUTES AND REGULATIONS:	
Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII)	*passim*
Section 703(h)	13, 22-24
Education Amendment of 1972 (Title IX)	9
Fair Labor Standards Act, 29 U.S.C. § 206(d) (Equal Pay Act)	*passim*

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS: Page

Hearings Before the Select Subcomm. on Labor of the Comm. on Education and Labor on H.R. 8898 and H.R. 10226, Part 1, 87th Cong., 2d Sess. (1962) 15, 16
Hearings Before the Special Subcomm. on Labor of the Comm. on Education and Labor on H.R. 3861 and Related Bills, 88th Cong., 1st Sess. (1963) 15-16
108 Cong. Rec. 14767 (1962) (remarks of Rep. St. George) 17
108 Cong. Rec. 14768 (1962) (remarks of Rep. Landrum) 17
109 Cong. Rec. 9195-98 & 9208-10 (1963) (remarks of Reps. Frelinghusyen, Goodell, Thompson and Griffin) 17
109 Cong. Rec. 9197 (1963) (remarks of Reps. Thompson & Griffin) 17
109 Cong. Rec. 9197 (1963) (remarks of Rep. Goodell) 18
109 Cong. Rec. 9198 (1963) (remarks of Rep. Goodell) 13
109 Cong. Rec. 9198 (1963) (remarks of Rep. Halleck) 17
109 Cong. Rec. 9199-200 (1963) (remarks of Rep. Dwyer) 16
110 Cong. Rec. 2581, 2582, 2720 (1964) (remarks of Rep. Green) 20
110 Cong. Rec. 7208, 7215, 7217 (1964) (remarks of Sen. Clark) 21
110 Cong. Rec. 13647 (1964) (remarks of Sen. Bennett) 22
110 Cong. Rec. 15896 (1964) (remarks of Rep. Celler) 24
111 Cong. Rec. 11359 (1965) (remarks of Sen. Bennett) 23
111 Cong. Rec. 11360 (1965) (remarks of Sen. Dirksen) 23

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS: Page

Chaikin, Address, *The New Pay Push for Women*, quoted in Business Week (Dec. 17, 1979) 30
Comparable Worth: Issues and Alternatives (E.R. Livernash ed. 1980) 6, 11-12, 29-31
Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971) 20
The EEOC's Bold Foray Into Job Evaluation, Fortune (September 11, 1978) 31
Lindsay, *Equal Pay for Comparable Work: An Economic Analysis of a New Antidiscrimination Doctrine*, Law and Economics Center, University of Miami (1980) 12, 30
Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 Minn. L. Rev. 877 (1967) 20
Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. Mich. J.L. Ref. 231 (1980) 12, 14, 30, 32
Reply Memorandum for Petitioner in *United States Department of Education* v. *Seattle University*, U.S. No. 80-493 9
U.S. Department of Labor Employment Training Administration, *Years for Decision*, Vol. 4 (1978) 28
Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. Cal. L. Rev. 965 (1973) 20
Editor's Note, EEOC, *Discrimination Forbidden: Sex Discrimination, Legislative History of Titles VII and XI of the Civil Rights Act of 1964* 20

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The Amici Curiae, with the written consent of all parties, respectfully submit this brief as Amici Curiae in support of the Petitioners.

INTEREST OF THE AMICI CURIAE

The Amici Curiae are public and private employer associations whose members' job evalution and compensation systems could be affected by the Court's decision in the instant case.[1] In its decision below, the Ninth Circuit held that a disparity in the pay rates for two different jobs, one predominantly held by male employees and the other by females, even though not actionable under the Equal Pay Act (29 U.S.C. § 206(d)) because of the dissimilarity between the jobs, nevertheless could violate Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.* (Title VII)). The Amici Curiae are concerned that affirmance of the decision below would be directly contrary to the will of Congress and could have unwarranted, adverse effects on widely used and accepted compensation systems.

STATEMENT OF THE CASE

The plaintiffs are female jail matrons who allege that the County violated Title VII by paying them less than it pays male corrections officers. During the trial, they attempted at length, but without success, to demonstrate that the work they performed was substantially equal to that of the male jailers. Both the district court and Ninth Circuit found that the matrons' jobs were substantially dissimilar to the male jail jobs. The Ninth Circuit stated that male guard work was "qualitatively different" from the matron position because of the "significantly greater effort and . . . responsibility" involved. (Pet. App. at 30a). In addition, the male jobs in question were "open to both males and females," (Pet. App. at 23a), but despite the matrons' concern about equal pay, they did not apply to become corrections officers. (Pet. App. at 68a).

The Ninth Circuit acknowledged that the dissimilarity between the two jobs would preclude recovery under the Equal Pay Act. Nevertheless, the court held that the

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[1] The individual Amici Curiae are described in the Appendix to this brief.

plaintiffs could attempt to prove on remand sex-based wage discrimination based on other unexplained theories. In so holding, the Ninth Circuit attempted to distinguish the situations to which the Equal Pay Act and Title VII apply. It stated that the Equal Pay Act applies only when there has been a denial of equal pay for equal work, not "where the plaintiff is performing *comparable* (but not substantially equal) work . . ." (Pet. App. at 32a, emphasis added); but it viewed Title VII as a much broader statute.

This conclusion was based upon the panel's narrow construction of the "Bennett Amendment" to Title VII, which states that it is not illegal for an employer to differentiate on the basis of sex "if such differentiation is authorized by the provisions of [the Equal Pay Act]." Although finding that either of two possible interpretations was "plausible" (Pet. App. at 33a), the panel held that the amendment only incorporated the Equal Pay Act's four affirmative defenses into Title VII and did *not* also impose impose the Equal Pay Act's "equal work" standard upon Title VII as the *sole* basis for sex-based compensation claims. The primary basis for the panel's holding was that there was no "clear Congressional directive" (Pet. App. at 36a) that would apply to the situation before the Court.

In a supplemental opinion denying the County's petition for rehearing, the Ninth Circuit reaffirmed its initial ruling that Title VII may be construed to cover sex-based compensation claims which do not meet the "equal work" standard of the Equal Pay Act. (Pet. App. at 2a-19a). The court stated that "a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory compatible with Title VII. It is unnecessary to determine now what theories might be feasible." (Pet. App. at 18a).

In response to the County's concerns that the court's order would undermine the equal work standard of the

Equal Pay Act, the Ninth Circuit stated that (Pet. App. at 17a-18a, emphasis added):

> The effect of our decision will not be to substitute a "comparable" work standard for an "equal" work standard. Where a Title VII plaintiff, claiming wage discrimination, attempts to establish a prima facie case based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male. The standards developed under the Equal Pay Act are relevant in this inquiry. *In most cases*, an equal work theory will provide the *most practical method* of establishing a prima facie case of wage discrimination.

It supported this portion of its opinion by noting that when Congress enacted the Equal Pay Act, it rejected the "comparable" work standard. (Pet. App. at 17a). The case thus was remanded to the district court to consider plaintiffs' alternative claims.

SUMMARY OF ARGUMENT

The social problem of sex-based compensation discrimination directed primarily against females received close Congressional scrutiny during the deliberations on the Equal Pay Act. After extensive hearings and debates, Congress realized that the means for resolving the problem must be carefully chosen to be "meaningful to employers and workable across the broad range of industries covered by the Act." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 198 (1974). Because of the numerous problems involved in making comparisons between dissimilar jobs, Congress rejected comparable work language and adopted the equal work standard.

The next year, the same Congress passed Title VII, which provided qualified female plaintiffs with equal opportunity in hiring, transfers and promotions, but also, through the Bennett Amendment, ensured that the standard applicable to sex-based wage discrimination claims

would be the "equal work" standard. Congress thereby intended to prevent courts and federal agencies from becoming entangled in adjudicating the wage rates for dissimilar jobs, while guaranteeing women access to all jobs with the same pay as men performing equal work.

By permitting a Title VII cause of action in a situation where the equal work standard has not been met, the Ninth Circuit has misinterpreted and undermined the intent of Congress. The court's primary error lay in its conclusion that, absent direct evidence to the contrary, Title VII's general prohibition of sex discrimination in employment must prevail over the more specific provisions of the Equal Pay Act. The court thus misconstrued the burden of proof in legislative interpretation and breached this Court's well-established rule of *in pari materia* construction. When Congress has addressed a particular problem with a specific statute (here the Equal Pay Act), that statute will control over more general legislation (here Title VII) regardless of which was first enacted, unless there is clear legislative history showing that the standards in the specific statute were not intended to apply to the more general statute. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976). There is no legislative evidence whatsoever that Title VII's general ban on employment discrimination based on sex was meant to supplant the equal work standard.

The Ninth Circuit's concern that intentional discrimination might be involved in wage discrimination cases does not require a different conclusion. Assertions of intentional wage discrimination against women were fully considered when Congress passed the Equal Pay Act. Congress' response was to limit the involvement of the government and the courts to situations involving equal work. Also, stark evidence of intentional discrimination is rare. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Thus, proving that an employer paid less to women than

men for performing "comparable" jobs would require a determination of whether or not the jobs in fact were "comparable." This is precisely the analysis Congress rejected as an unworkable and inappropriate exercise for the courts. Once the courts began dissecting and analyzing employers' wage setting processes in search of indirect evidence of intentional discrimination, they would inevitably become bogged down in the wage setting process. For as numerous experts have recognized, "there is no universally accepted value system" to determine whether "a set of given . . . salary relationships are or are not discriminatory." *Comparable Worth: Issues and Alternatives* 10 (E. R. Livernash ed. 1980) (hereinafter cited as Livernash).

The courts and federal agencies are ill-equipped to make judgments concerning job evaluation and wage rates which involve comparisons of the characteristics of different jobs. Even experienced experts in job evaluation and compensation recognize that the methodologies and techniques of their field are not readily adaptable to judicial application. It should not be taken for granted, therefore, that Title VII enables protected groups other than women to establish compensation discrimination based upon the comparability of jobs, or that rejection of the equal work standard is necessary in order that women not be treated differently from other protected classes.

Furthermore, the negative impact of such an undertaking on the economy, on established compensation and collective bargaining systems, and on the labor market would be immense. Congress plainly sought to avoid these adverse consequences when it legislated in this area in 1963 and 1964. Where Congress has resolved a particular labor relations problem, it is only Congress, and not the courts, that can change this statutory compromise. *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 644 (1967).

ARGUMENT

CONGRESS DID NOT INTEND, IN ENACTING TITLE VII, TO INVEST THE FEDERAL COURTS WITH JURISDICTION TO DISSECT AND ANALYZE EMPLOYERS' PAY POLICIES IN SEARCH OF EXPLANATIONS FOR DIFFERENCES IN THE WAGES PAID TO MEN AND WOMEN PERFORMING DISSIMILAR JOBS.

Resolution of the issues in this case turns upon the relationship between the Equal Pay Act and Title VII. The correct approach was aptly summarized by Judge Van Dusen in his dissenting opinion in *IUE* v. *Westinghouse Electric Corp.*, 23 FEP Cases 588, 604 (3d Cir. 1980), *pet. for reh'g denied, pets. for cert. pending*, Nos. 80-781 & 80-944:

> [R]ead together Title VII and the Equal Pay Act provide a balanced approach to resolving sex-based wage discrimination claims. Title VII guarantees that qualified female employees will have access to all jobs, and the Equal Pay Act assures that men and women performing the same work will be paid equally. This approach provides a mechanism for eliminating sex-based wage discrimination, while, at the same time, assuring that the courts and federal agencies will not become entangled in adjudicating the wage rates to be paid for dissimilar jobs—a process in which they have little expertise.

Thus, "[s]ufficient remedies exist under Title VII to deal with discriminatory hiring and promotional practices, without the courts becoming embroiled in determinations of how an employer's work force ought to be paid." *Kohne* v. *Imco Container Co.*, 480 F. Supp. 1015, 1039 (W.D. Va. 1979). The Ninth Circuit's decision is directly at odds with Congress' approach and should be reversed. For where Congress has acted "to adjust the Nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the develop-

ing state of labor relations in this country," then it is only Congress and not the courts that can change that pattern.[2]

A. The Ninth Circuit's Opinion Circumvents the Will of Congress by Inviting Plaintiffs to Compare the Relative Components of Dissimilar Jobs as a Basis for Sex-Based Compensation Claims.

The Ninth Circuit's treatment of the relationship of the Equal Pay Act to Title VII is inconsistent. In the first instance, it recognized the importance of the Equal Pay Act's legislative history and stated that "when the Congress included sex into Title VII it was fully aware, from the previous year's hearings, of the employment problems of women." (Pet. App. at 16a-17a). It noted that Congress rejected the "comparable" work standard when it adopted the Equal Pay Act. (Pet. App. at 17a). The court held, in light of this history, that the "equal" work standard would be binding on Title VII plaintiffs whose sex-based compensation claims were based merely upon a comparison of male and female jobs. (*Id.*).

Nevertheless, the Ninth Circuit proceeded to disregard Congressional intent by holding that Title VII sex-based compensation claims could be proved under some standard other than the equal work standard. Indeed, the court stopped short of foreclosing claims based solely on comparison of different jobs. Rather, it stated that "[i]n most cases" the equal work theory would provide the "most practical," but apparently not the sole, method of establishing a claim. (Pet. App. at 17a).

The Ninth Circuit's opinion thus invites plaintiffs with job comparison claims to circumvent the equal work standard by contending that differentials in pay between jobs performed by males and females are too great to be explained by plaintiffs' conception of the difficulty, skill, training, etc., involved in the two jobs. The inquiry thus

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[2] *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 644 (1967).

is shifted from a relatively narrow examination of the "equality" of the jobs,[3] to a comparison of the various components of dissimilar jobs to see if their respective characteristics explain the wage differential. Whether or not the complaint contains an allegation of purposeful discrimination, this type of suit would necessarily entail the kind of judicial inquiry Congress intended to preclude when it passed the Equal Pay Act—*i.e.*, "second-guessing the validity of a company's job evaluation system."[4] It was precisely to avoid this type of suit that Congress refused to "authorize the Secretary [of Labor] or the Courts to engage in wholesale reevaluation of any employer's pay structure in order to enforce their own conceptions of economic worth."[5]

The argument that an allegation of intentional discrimination somehow changes the character of these cases and requires the abandonment of the equal work stand-

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[3] A determination of whether the jobs are "equal" requires an examination into whether the same skill, effort, responsibility and working conditions are involved. *See Corning Glass Works* v. *Brennan*, 417 U.S. 188, 200-01 (1974). Even this relatively simpler level of inquiry has given the courts "no small difficulty" in its application. *Angelo* v. *Bacharach Instrument Co.*, 555 F.2d 1164, 1170 (3d Cir. 1977).

[4] *Corning Glass Works*, 417 U.S. at 200.

[5] *Brennan* v. *Prince William Hosp. Corp.*, 503 F.2d 282, 285 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); *Christopher* v. *Iowa*, 559 F.2d 1135 (8th Cir. 1977) (comparability of jobs insufficient to establish an Equal Pay Act violation); *Horner* v. *Mary Inst.*, 21 FEP Cases 1069, 1074 (8th Cir. 1980); *Imco Container Co.*, 480 F. Supp. at 1039.

This concern that the decision below will invite comparisons of dissimilar jobs is not speculative. The Solicitor General has argued that the *Gunther* decision holds that Title VII "prohibits discrimination on the basis of sex among employees holding 'comparable,' although not 'substantially equal,' jobs" and that Title IX of the Education Amendments of 1972 should be enforced on the same basis. *See* Reply Memorandum for Petitioner in *United States Dep't of Educ.* v. *Seattle Univ.*, U.S. No. 80-493 at 2, n.1.

ard is misleading. As shown below, Congress was fully aware of the existence of intentional wage discrimination when it passed the Equal Pay Act. It recognized the breadth of this social problem, but also realized that the problem "was more readily stated in principle than reduced to statutory language which would be meaningful . . ." *Corning Glass Works* v. *Brennan*, 417 U.S. at 198. After extensive study and debate, the equal work standard was adopted to narrow the basis for enforcement and interpretation.

Similarly, allegations of intentional sex discrimination in the setting of compensation are more readily generalized than substantiated. The existence of the "smoking gun" that demonstrates the employer's culpability is far more unusual than some might postulate. Consequently, because instances of "stark" intentional discrimination "are rare," the courts would be required to "look to other evidence." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Indeed, in the instant case, the plaintiffs have essentially based their compensation claims upon their dissatisfaction with the size of the pay differential between the two jobs and upon a comparison of the characteristics of their jobs with those performed by males. Whether the necessary inquiry is labelled as a search for indirect evidence of intentional discrimination or as a comparison of dissimilar jobs, the process of resolving such claims would be an extremely difficult undertaking, as Congress recognized in rejecting such an approach.

Although it cited no illustrative direct evidence where sexism was the impetus for wage setting in predominantly female jobs in this or any other reported case, the Ninth Circuit set forth two hypotheticals that purportedly illustrate the dangers in applying the equal work standard. First, it was concerned that an employer could tell a female worker, whose job was not held by any male, that it would pay her more for that work if she were

a male. (Pet. App. at 54a n.9). This is another version of the hypothetical argument that under the equal work standard an employer could isolate a predominately female job category and arbitrarily cut its wages because no man was performing the job. But insofar as hiring or placement discrimination caused the isolated job category, Title VII already provides sufficient remedies (such as back pay, transfer and constructive seniority) without resort to job comparisons. Moreover, in this hypothetical, only one job category is involved and there would be no need to inquire whether, and to what extent, the difference in wages for *dissimilar* jobs was caused by factors based upon sex. Thus, the hypothetical is unrelated to the question in issue.

In the Ninth Circuit's second example, a job held primarily by women is "comparable" but not substantially equal to a job performed by men, and the employer decreases (because of their sex) the rate of the job held by women. (Pet. App. at 54a n.9). Or, to the same effect, the job held primarily by women is left at the same wage level, while the rates of "comparable" jobs held by men are increased; or the rate of the job held by women is not raised by as much as the comparable but dissimilar job held by men. In these situations, the key question once again is whether the jobs are "comparable." Yet, as the Ninth Circuit itself acknowledged (Pet. App. at 17a), Congress had previously rejected involvement by the courts in determinations of what was "comparable."

Comparison of different jobs and the wage rate relationship between them has been recognized by job evaluation experts to be an uncertain process. Where comparability determinations are involved, "[f]rom a logical basis, it is impossible to prove that a set of given structural wage or salary relationships are or are not discriminatory." Livernash at 10.[6] Similarly after a

[6] Other job evaluation experts agree. *See* Livernash at 41 (Milkovich: "The unresolved dilemma facing researchers is how

complete analysis of methods for measuring whether the residual wage differential between different jobs is due to discrimination, another study concluded that concepts of sex-based wage discrimination, as now formulated, remain amorphous theories based upon unmeasurable concepts. It stated: "the experts agree that the necessary analytical methodology [to determine whether a wage differential is discriminatory] does not exist today." *See* Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. Mich. J.L. Ref. 231, 253-58, 288 (1980) (hereinafter cited as Nelson, Opton & Wilson).

This widespread recognition of the enormous practical problems inherent in any effort to identify the existence or specific impact of discrimination upon the relative wage rates paid to men and women performing dissimilar jobs is particularly pertinent to the issue before the Court, because it helps explain relevant Congressional intent. For, as shown below, the ambiguity in the concept of "comparability" was a major concern of Congress in 1962 and 1963 when it took its first and only detailed look at sex-based wage differentials.

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to separate that portion of differences in occupations that may be related to productivity and thus, wage differences, from the portion that is the product of discriminatory employment practices."); 59 (Schwab: "Unfortunately, job worth has not been adequately defined nor has a consensus emerged as to its meaning. In fact, authors have been remarkably reticent to offer any definitions of worth at all. As a consequence, there is very little basis for accepting one set of compensable factors as better representing worth than any alternative set."); 94 (Hildebrand: "What must be emphasized here, however, is that the comparability and the rank order obtained are purely statistical artifacts: both depend upon the evaluation method chosen."). *Accord*, Lindsay, *Equal Pay for Comparable Work: An Economic Analysis of a New Antidiscrimination Doctrine*, Law and Economics Center, University of Miami (1980) at 3 ("But, wage determinations in different occupations is a complex, simultaneous process. Relative wages result from the interplay of supply and demand in each occupation and are unlikely to correspond very well to the predictions of any simple, single-equation statistical model.").

It would be contrary to the legislative history of Title VII and the Equal Pay Act to suggest that liability for wage differentials could be based upon untenable methodology or that the courts should become heavily involved in determining compensation practices. Indeed, as the Court indicated in *United Steelworkers* v. *Weber*, 99 S. Ct. 2721 (1979), Title VII could not have been passed "without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business." 99 S. Ct. at 2729. As their price for supporting Title VII, they demanded that "management prerogatives and union freedoms . . . be left undisturbed to the greatest extent possible." *Id.*[7] Those same concerns motivated Congress when it added the equal work standard to the Equal Pay Act to ensure that private parties would "have the maximum degree of discretion in working out . . . how much [employees] should be paid." 109 Cong. Rec. 9198 (1963) (remarks of Rep. Goodell). Because the Ninth Circuit's interpretation could severly disrupt existing employment practices (see below pp. 29-32) and would leave the courts and employers with no clear measure of liability or standard of proof, its construction should be rejected.

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[7] *Accord, Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."). Section 703(h) limits the scope of Title VII and has been construed as an expression of Congressional recognition that there are practical reasons for permitting employment practices that would otherwise be illegal under the statute. *See Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 352 (1977); and *California Brewers Ass'n* v. *Bryant*, 100 S. Ct. 814, 820 (1980) (Title VII left employers and the employees' bargaining representative the "freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment."). Title VII thus was not intended to cure any and all societal problems that might be complained of as discriminatory. Congress has chosen to apply its regulatory authority only to those employment practices where the burdens of proof and disruption of the workplace would not be unreasonable or impractical.

Moreover, it cannot be assumed that applying the equal work standard to sex-based compensation claims necessarily would result in female plaintiffs being treated differently than other protected groups. It is not clear that the equal work standard would be applicable only to sex-based compensation claims,[8] and it has not been established that nonsex-based compensation claims could be maintained by comparing dissimilar jobs. Whatever the identity of the plaintiff, job comparison cases would still require the courts to set relative wages throughout entire wage structures for different jobs. The prohibitive statistical and practical difficulties of entertaining such claims would not evaporate simply because the plaintiffs are not females. *See* Nelson, Opton & Wilson at 326 n.15. The courts would be engaged in setting compensation according to their conceptions of job worth—a task that would be hopelessly involved and inappropriate for judicial resolution.

Although the standard for nonsex-based compensation claims need not be addressed by this court, it is noteworthy that the discrimination addressed by Title VII was manifest primarily in the segregation of minorities into inferior jobs rather than into jobs which were the same as or comparable to those performed by whites. The social issue addressed by the Equal Pay Act thus was distinct from the general thrust of Title VII and received special treatment from Congress. As shown below, Congress perceived the problem of discrimination in pay for the same and comparable work as a form of discrimination directed primarily at women. See p. 15 and n.10, *infra*. Congress provided a specific remedy after fully exploring and considering this particular type of discrimination.

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[8] See *Patterson* v. *Western Devel. Labs*, 13 FEP Cases 772, 776 (N.D. Cal. 1976); and *Chapman* v. *Pacific Tel. & Tel. Co.*, 456 F. Supp. 65, 68 n.5 (N.D. Cal. 1978).

B. The Equal Pay Act's Equal Work Standard was Congress' Specific Response to Complaints of Compensation Discrimination Against Women.

The Equal Pay Act and Title VII were passed by consecutive sessions of the Eighty-eighth Congress. The extensive Equal Pay Act committee activity, hearings and floor deliberations examining the problem of sex-based compensation discrimination are in sharp contrast to the brief treatment given the entire subject of sex discrimination during Title VII's enactment.[9] In the Equal Pay Act's history, Congress devoted close attention to the approach which should be taken toward the problem of sex-based compensation discrimination. The court below, however, ignored the overriding importance of this history.

Perhaps the Ninth Circuit's most fundamental error was its conclusion that because the equal work language of the Equal Pay Act was narrower, Title VII's nonspecific ban of sex discrimination could be read as evidence of Congressional purpose to sanction sex-based compensation claims not envisioned by the Equal Pay Act. (*See* Pet. App. at 32a). The court below failed to view the Equal Pay Act in its proper perspective, that is, as Congress' specific resolution of a widespread and well-documented problem of compensation discrimination directed *primarily against women.*[10]

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[9] The legislative history of Title VII's sex discrimination provision is "notable primarily for its brevity." *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 143 (1976).

[10] "Women have been the principal victims of discrimination in this area." Testimony of Secretary of Labor Goldberg. *Hearings Before the Select Subcomm. on Labor of the Comm. on Education and Labor on H.R. 8898 and H.R. 10226, Part 1*, 87th Cong., 2d Sess. 15 (1962) (hereinafter cited as *1962 House Hearings*).

"Principally, however, wage discrimination is practiced against the female worker. It is a condition that spreads across all levels of employment." Remarks of Representative Thompson, *Hearings*

Congress' response to exhaustive evidence of the societal differential in men and women's average wages,[11] and the existence of widespread intentional compensation discrimination against women,[12] was to enact the Equal Pay Act. As the Third Circuit stated:

> The Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.

Shultz v. *Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

Although the widespread problem Congress addressed was copiously documented, "[t]he most notable feature of the history of the Equal Pay Act is that Congress recognized early in the legislative process that the concept of equal pay for equal work was more readily stated in

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Before the Special Subcomm. on Labor of the Comm. on Education and Labor on H.R. 3861 and Related Bills, 88th Cong., 1st Sess. 2 (1963).

The County's brief contains additional examples from the Congressional hearings and debates which demonstrate that Congress was well aware of the breadth of the problem of sex discrimination in wage rates.

[11] In the 1963 Equal Pay Act debates, Representative Dwyer stated:

> The gap between income levels of men and women workers is actually widening: In 1955, women workers' median income was 64 percent of that of men workers; in 1960, the median women's wage was only 61 percent of that of men.

109 Cong. Rec. 9199-200 (1963). *See also* the testimony of Assistant Secretary of Labor Esther Peterson, *1962 House Hearings* at 24-86.

[12] *See Corning Glass Works*, 417 U.S. at 195 (Equal Pay Act was enacted to remedy endemic problem of employment discrimination based on the out-moded belief that women should be paid less than men). *See also Shultz* v. *First Victoria Nat'l Bank*, 420 F.2d 648, 656-57, nn.17-20 (5th Cir.), *pet. for reh'g denied*, 420 F.2d 659 (5th Cir. 1969).

principle than reduced to statutory language which would be meaningful . . . ." *Corning Glass Works* v. *Brennan*, 417 U.S. at 198. The original language of the legislation proposed in 1962 would have authorized broad involvement by the courts in situations of alleged wage discrimination. In 1962, however, when the House deleted the "comparable work" standard and substituted the "equal work" standard, Representative St. George explained in introducing this change that there is a great difference between the terms equal and comparable: "The word 'comparable' opens up great vistas. It gives tremendous latitude to whoever is to be arbitrator in these disputes." [13] Congress, therefore, precluded the courts from making wage comparability determinations.

The 1963 House debates on the Equal Pay Act reveal a notable degree of bipartisan unanimity that the Congress should not permit the Secretary of Labor or the courts to engage in resolving broadly-stated allegations of sex-based compensation discrimination.[14] The remarks of Representative Goodell are representative and clearly point out the limited role Congress intended the courts to play in scrutinizing compensation systems. He stated:

> I think it is important that we have clear legislative history at this point. Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs

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[13] 108 Cong. Rec. 14767 (1962). See also the remarks of Representative Landrum, *Id.* at 14768, who stated that the "equal work" amendment would prevent: "the trooping around all over the country of employees of the Labor Department harassing business with their various interpretations of the term 'comparable' when 'equal' is capable of the same definition throughout the United States."

[14] *See* 109 Cong. Rec. at 9197 (1963) (remarks of Reps. Thompson and Griffin) and *Id.* at 9198 (Rep. Halleck). Representatives Frelinghuysen, Goodell, Thompson and Griffin expressed Congress' clear intention that comparisons of dissimilar jobs could not be the basis for compensation claims. *Id.* at 9195-98, 9208-10. The County's brief contains a complete exposition of the legislative history.

> involved should be virtually identical, that is, they would be very much alike or closely related to each other.
>
> We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and working conditions, is intended to make this point very clear.

109 Cong. Rec. 9197 (1963).

This history demonstrates that although Congress recognized the extent of sex-based compensation discrimination, it also realized that there were sound practical reasons to narrow the methods for resolving the problem. The Ninth Circuit's approach, therefore, is unsupportable.

C. The Ninth Circuit Erred When it Concluded that the Language of Title VII Necessarily Meant that Congress Intended to Expand the Law Applicable to Sex-Based Compensation Claims.

The Ninth Circuit's statutory analysis stems from the incorrect premise that Title VII's undefined sex discrimination provision must be read as broader than the Equal Pay Act, absent evidence of Congressional intent to the contrary.[15] That notion conflicts directly with this Court's repeated holding that " '[w]here there is no clear inten-

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[15] The court stated that Title VII's plain broad language should not be limited "in the absence of a clear Congressional directive." (Pet. App. at 36a). It further speculated, without any reference to any legislative history whatsoever, that Congress "may have believed that the Equal Pay Act by itself was inadequate to remedy sex discrimination, or that broader protections were necessary." (Pet. App. at 17a).

tion otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976), *citing Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974). *See also United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976). As with the statutes involved in those cases, when Congress passed the narrower provisions of the Equal Pay Act, "it was focusing on the particularized problems" (426 U.S. at 153) of sex-based compensation discrimination. Under this Court's decisions, the fact that Title VII addresses sex discrimination in more general terms than the Equal Pay Act is no reason to effectively repeal the Equal Pay Act by allowing plaintiffs to bring claims under Title VII and circumvent the earlier Congressional judgments.

As we now show, there is no legislative history concerning Title VII which indicates Congress intended to abandon its carefully developed "equal work" standard for adjudicating sex-based wage discrimination claims. Actually, whenever Congress did refer to sex-based wage discrimination during the consideration of Title VII, its intent clearly was to preserve the equal work standard and not to nullify the judgments reflected in the Equal Pay Act.

D. The Legislative History of Title VII Demonstrates that the Equal Work Standard was to be Applied to All Sex-based Compensation Claims.

Title VII's legislative record indicates that the equal work standard was meant to apply to sex-based compensation discrimination claims under that Act as well. Indeed, there is no evidence whatsoever that Title VII was intended to be broader than the Equal Pay Act in this subject area.

H.R. 7152, the House bill ultimately enacted as the Civil Rights Act of 1964, was intended to protect pri-

marily the rights of Negroes and other minorities.[16] When it went to the House floor for consideration, it did not contain any sex discrimination provision. "In fact, the matter of sex discrimination had not even been considered during the [House] hearings." Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 Minn. L. Rev. 877, 880 (1967) (hereinafter cited as Miller).[17] Indeed, "[i]n view of the political pressures which surrounded the bill, it is hardly surprising that no one [at that time] viewed it as a vehicle to secure equal rights for women." Miller at 880.

It was not until the penultimate day before passage after two weeks of debate that an amendment to add sex discrimination was introduced by Representative Howard Smith of Virginia, Chairman of the House Rules Committee and Title VII's principal opponent.[18] Since the sex discrimination provision of Title VII was given very little consideration by the House, no congressonal mandate can be found to "extend the [sex discrimination] coverage of the Act to situations of questionable application. . ." [19]

1. *The Clark Memorandum*

When the civil rights bill was considered by the Senate after it had passed the House, the Senate "paid especial

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[16] Editors Note, EEOC, *Discrimination Forbidden: Sex Discrimintaion, Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, 3213; *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1166 (1971); and 110 Cong. Rec. 2581 (1964) (remarks of Rep. Green).

[17] *See also* 110 Cong. Rec. 2582, 2720 (1964) (remarks of Rep. Green).

[18] Miller at 880; Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. Cal. L. Rev. 965, 968 (1973).

[19] *Willingham* v. *Macon Tel. Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (*en banc*).

attention to the provisions of the Equal Pay Act." [20] For example, after the House passed the bill with the sex discrimination provision and the Senate had debated it for three weeks, Senator Clark, one of Title VII's floor managers, submitted a memo in response to several of the questions and unfounded objections that had been raised regarding the meaning of the bill.[21] One of the objections was that Title VII's sex discrimination provision would extend the Equal Pay Act's coverage, did not contain the equal work standard and thus would "cut across different jobs." 110 Cong. Rec. 7217 (1964). The reply was that "[t]he standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII." *Id.*[22]

Thus, even before the Equal Pay Act was mentioned in Title VII in the Bennett Amendment, the bill's sponsors understood that sex discrimination wage claims would not be broadened to "cut across different jobs" and be applied to jobs that were not "equal." This was a clear reply to concerns that Title VII might be construed to permit wage claims when dissimilar jobs were involved, and was not, as the Ninth Circuit assumed (Pet. App. at 7a-8a), a statement that the equal work standard would apply to Title VII only when a plaintiff alleged that "equal work" was involved. The Ninth Circuit's construction would interpret Senator Clark's statement as agreeing with the objection he had selected for rebuttal. On

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[20] *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 143 (1976). In that decision, the Court held that the Bennett Amendment made interpretations of the Equal Pay Act's core "equal pay for equal work" provision applicable to Title VII. The decision held that the employer's disability benefit plan did not violate Title VII, relying in part upon an interpretation by the Wage and Hour Administrator of the core "equal pay for equal work" provision of the Equal Pay Act. *Id.* at 144.

[21] 110 Cong. Rec. 7208, 7215, 7217 (1964).

[22] The objection and reply are set out in full at Pet. App. at 6a.

the other hand, applying equal work standard to all Title VII compensation claims based on sex would avoid any conflict between the two statutes with respect to the applicable legal standard. But the fact of the matter is, as shown by Senator Clark's memorandum, Congress intended, even before the Bennett Amendment was proposed, to preserve the "equal work" standard under Title VII. Certainly Senator Clark's comments do not indicate any intent to abandon the equal work standard under Title VII.

2. *The Bennett Amendment*

The Bennett Amendment, which states that it is not illegal for an employer to differentiate in compensation upon the basis of sex "if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938 [the Equal Pay Act] . . ." can thus be read as an explicit recognition of a limitation on the scope of the statute which Senator Clark felt was already clear. This construction, of course, explains why Senator Bennett's amendment was accepted by the floor leadership as a "technical" amendment to serve as a "clarification" of the statute. *See* 110 Cong. Rec. 13647 (1964). This interpretation, moreover, is consistent with Senator Bennett's statement, when he called up his amendment, that not enough attention had been paid to possible conflicts which could arise between the two statutes by the "wholesale" insertion of the word "sex" in Title VII. *Id.* He stated, "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." *Id.* The obvious intent was to limit the scope of Title VII, not to broaden it. This interpretation thus eliminates the statutory conflicts; the Ninth Circuit's exacerbates them.

The Ninth Circuit's interpretation, moreover, negates any need for the Bennett Amendment. The Equal Pay Act contains four statutory defenses. Except for the fourth defense (a factor other than sex), Section 703(h) already contained those defenses when the Bennett

Amendment was introduced on the Senate Floor after Title VII's initial House passage. The opening sentence of Section 703(h) already protected compensation based on a seniority system, a merit system or a system which measures earnings by quantity or quality of production. The fourth Equal Pay Act defense, a "factor other than sex," already was covered by the core provisions of Title VII which make Title VII applicable only if there is discrimination on the basis of sex. Thus, the conclusion that the Bennett Amendment was intended only to incorporate defenses which were already contained in the statute makes no sense, as it renders the Bennett Amendment superfluous and meaningless.[23]

Apparently recognizing that its analysis left the Bennett Amendment with no substantive content, the Ninth

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[23] In 1965, Senator Bennett realized that some commentators were interpreting his Amendment in the manner ultimately adopted by the Ninth Circuit in this case. To counter this construction, he stated that the Bennett Amendment was intended to assure that the same standards would be applicable to all wage rate claims brought under both Title VII and the Equal Pay Act. His interpretation stated in relevant part:

> The amendment therefore means that it is not an unlawful employment practice. . . . to have different standards of compensation for non-exempt employees, where such differentiation is not *prohibited* by the equal pay amendment to the Fair Labor Standards Act.
>
> Simply stated, *the [Bennett] amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act.*

111 Cong. Rec. 13359 (1965) (emphasis added).

When the Ninth Circuit refused to give this statement any weight because it could "at best" only reflect Senator Bennett's own understanding (Pet. App. at 4a-5a), it failed to make any reference to Senator Dirsken's statement that the interpretation was the one which he, Senator Humphrey and their staffs had in mind when the Bennett Amendment was adopted by the Senate. 111 Cong. Rec. 13360 (1965). He added that: "I trust that this will suffice to clear up in the minds of anyone, whether in the Department of Justice or elsewhere, what the Senate intended when that amendment was accepted." *Id.*

Circuit erroneously attempted to construe the affirmative defenses contained in the first sentence of Section 703 (h) as making "no substantive alteration of Title VII." (Pet. App. at 10a). Because it viewed Section 703(h) as not involving substantive matters, it stated that the Bennett Amendment "need not have effected a 'substantive' change." (*Id.*). The court's major premise, however, is incorrect. As this Court has made clear, Section 703(h) is "a definitional provision; as with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not." [24]

3. *The Celler Statement*

The Ninth Circuit also misinterpreted the statement by Congressman Celler (the bill's original sponsor and House floor leader) that the Bennett Amendment: "[p]rovides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex—section [703 (h)]." 110 Cong. Rec. 15896 (1964). By stating that "compliance with the [Equal Pay Act also] satisfies the requirement[s]" of Title VII, he recognized that differences in compensation that do not violate the Equal Pay Act are authorized by the Bennett Amendment for purposes of Title VII.

The Ninth Circuit, without reconciling the clear import of this statement, simply said that "this solitary comment" was "insufficient to establish the County's interpretation of the Bennett Amendment in view of the *contrary or inconclusive* legislative history previously discussed [by the court]." (Pet. App. at 8a, emphasis added). The court's choice of the words "contrary or inconclusive" is remarkable, because the court's previous discussion contained no reference to *any* legislative history af-

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[24] *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 758 (1976); *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. at 346-47; *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 559 (1977).

firmatively supporting its own interpretation. Thus, while brushing aside an argument to which it offered no real answer, the court conveyed the erroneous impression of legislative support for a contrary interpretation. This again illustrates that there is simply no clear Congressional directive permitting the courts to disregard the equal work standard.

E. The Decisional Authority Demonstrates that Wage Discrimination Claims Under Title VII are Limited to Claims Which Satisfy the "Equal Work" Standard Developed by Congress Under the Equal Pay Act.

The Ninth Circuit concluded that most decided cases have not addressed whether Title VII reaches male-female wage differences which do not violate the Equal Pay Act. But as set forth more fully in the County's Brief and Petition for Certiorari (at 11-12 & n.4), virtually all courts have ruled that a Title VII plaintiff must prove the performance of equal work for unequal pay in order to establish a prima facie case of sex-based wage discrimination. (*See* Pet. for Cert. 11-12 & n.4 and cases there cited).[25] Those decisions show that the courts were clearly of the view that a Title VII sex-based compensation claim which fails to establish equal work cannot then proceed on some other theory of compensation discrimination.[26]

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[25] The primary contrary authority decided since the Ninth Circuit's opinion is the Third Circuit's holding in *Westinghouse*, which relied heavily on the decision below and, for the reasons stated herein, wrongly interpreted the relevant statutory language and history. As the dissent in *Westinghouse* pointed out (23 FEP Cases at 603): "Until the decision in *Gunther* . . . no court of appeals had held that a Title VII claim of sex-based wage discrimination could be made out without proof of equal work." Judge Van Dusen then criticized the Ninth Circuit's decision because it "fails to discuss the application of the *in pari materia* canon of statutory construction." *Id.*

[26] *See, e.g., Orr* v. *Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 171 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975) ("To establish

The courts have recognized, moreover, that a broad reading of Title VII entails the risk of ignoring important economic and social factors which have significant legal consequences. For example, in *Christensen* v. *Iowa*, 563 F.2d 353 (8th Cir. 1977), female clerical workers argued that the University dicriminated against them by paying them less than male physical plant workers for jobs alleged to be of "equal value" to the University. The Eighth Circuit ruled that the plaintiffs had not established a prima facie case even apart from the Bennett Amendment. Instead of alleging a denial of an equal opportunity to work in the plant worker jobs, the female plaintiffs sought to establish a violation of the Act upon a showing that work of equal value to the employer did not command an equal market price. The Eighth Circuit held that:

> Appellants' theory *ignores economic realities.* The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of the workers to band together to bargain collectively for higher wages. We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.

563 F.2d at 356 (emphasis added).

Claims of discrimination similar to those in *Christensen* were rejected in *Lemons* v. *City & County of Denver*,

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a case under Title VII it must be proved that a wage differential was based upon sex and that there was the performance of equal work for unequal compensation."); and *Ammons* v. *Zia Co.*, 448 F.2d 117, 120 (10th Cir. 1971) ("[T]o establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal' work. . . .").

620 F.2d 228 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3211 (U.S. October 7, 1980) (No. 80-82). There, nurses alleged that the city violated Title VII by paying them lower wages because their jobs were traditionally female jobs. They claimed their positions should receive at least as much as certain other comparable professional jobs. Relying on the Bennett Amendment, the Tenth Circuit noted that the "comparable work" standard had been rejected by Congress in favor of the "equal work" standard. It held that "[t]he Bennett Amendment is generally considered to have the equal pay/equal work concept apply to Title VII in the same way as it applies in the Equal Pay Act." 620 F.2d at 299-30. Because equal work was not involved, the claim was dismissed. The court added that:

> The courts under existing authority cannot require the City within its employment to reassess the worth of services in each position in relation to all others, and to strike a new balance and relationship.
>
> . . . Plaintiffs are not seeking equality of opportunity . . . but instead would cross job description lines into areas of entirely different skills. This would be a whole new world for the courts, and until some better signal from Congress is received we cannot venture into it.

620 F.2d at 229.

The Ninth Circuit's opinion, in the instant case, is even more divorced from economic realities than the positions of the plaintiffs that were rejected in the above cases, for the Ninth Circuit suggests no methodology whatsoever to determine whether some of the wage differential between "qualitatively different" jobs is due to discrimination. *See supra*, pp. 11-12 & n.6.

The courts in the cases discussed above were aware that Title VII guarantees qualified women access to jobs at the hiring stage, as well as other stages of employment such as transfers, promotions, and training opportunities. Those decisions were consistent with the broad thrust of Title VII's nondiscrimination approach which

was to assure equal opportunities for access to all jobs. In the instant case, both the district court and the Ninth Circuit found that the male jobs with which the matrons made their comparisons were "open to both males and females," (Pet. App. at 23a), but despite their concern about equal pay, the matrons did not apply for them. (Pet. App. at 68a). This factor was ignored by the Ninth Circuit.

Under the Ninth Circuit's approach, employees who have themselves viewed the higher pay as *insufficient* to compensate for the differences in the work involved in other jobs, may nevertheless sue for that higher pay while remaining in the job they prefer. The Ninth Circuit's ruling thus places employers in the potential position of bearing legal responsibility for a social phenomenon over which they have no control.[27]

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[27] Job preference thus is an important consideration and has been seen a rebutting factor to claims of sex discrimination. *See Hilton* v. *Wyman-Gordon Co.*, 624 F.2d 379 (3d Cir. 1980); *Mazus* v. *Dep't of Transportation*, 629 F.2d 870 (3d Cir. 1980); *Durant* v. *Owens-Illinois Glass Co.*, 23 EPD ¶ 31,118 (E.D. La. 1980); and *Davis* v. *City of Dallas*, 483 F.Supp. 54 (N.D. Tex. 1979).

Female preferences for particular occupations introduces yet another set of complex, essentially unmeasurable factors that would make wage comparability determinations extremely unreliable when different jobs are involved in compensation discrimination cases. For example, a recent United States Department of Labor Study concluded: "Despite affirmative action programs and publicity on the career success of women in stereotypical male positions, most women have not changed their career aspirations. They continue to plan careers in traditionally female positions. As a result, they continue to occupy lower paying positions." U.S. Dep't of Labor, Employment Training Administration, *Years for Decision*, Vol. 4 (1978) at iii. The study also stated (*id.* at 114):

> To the extent that women prefer a typically female occupation, affirmative action programs directed solely at employers will not substantially reduce occupational segregation. Hence, in addition to pursuing a vigorous affirmative action program, public policy undoubtedly should be concerned with counseling and educational programs if young women are to be informed about the full range of available occupations.

F. The Potential Economic Consequences of the Ninth Circuit's Decision Clash With Congressional Intent.

As shown above, despite the Ninth Circuit's assurances to the contrary, its interpretation of Title VII would inevitably entangle the courts and administrative agencies in the process of analyzing and attempting to compare dissimilar jobs. Although it is difficult to estimate precisely all of the consequences its decision might have for the courts and the economy, recent studies by commentators and scholars have demonstrated that job comparison discrimination theories raise many economic and practical concerns which parallel those expressed by Congress when it narrowed the Equal Pay Act standard. A number of difficulties were summarized by Professor George Milkovich in the following observations:

> The debate over substituting comparable worth for equal work as the standard for wage discrimination hinges on two issues: (1) the current lack of a workable definition of comparable worth, and (2) more basically, the lack of any systematic analysis of the possible consequences of its application. . . . Will those currently employed in higher paid occupations perceive their wages to be unfairly low, and will future workers be less likely to invest in the training and education required for some of these jobs? How important are wage differentials in the allocation of the labor force? How will changing the occupational wage differentials affect individual decisions to choose one job over another, one career over another, or one employer over another?

Livernash at 46.

These problems were analyzed further by Professor George Hildebrand, who described the potential aggregate economic effect in the following terms:

> [T]he contemplated extension of the principle of equal pay for substantially equal work to encompass the vague rhetoric of comparable work is directed in essence to the reconstruction and the regulation of

> the wage and salary structures of defendant firms and their component parts throughout the county. Potentially, the scope for this exercise has no limits beyond the personnel and administrative capacities of the government agencies that would enforce it. In short, even assuming that the full achievement of such control might take several years, the proposal leads directly to administrative wage control for the entire American economy.

Livernash at 83. Addressing the social and economic consequences, Professor Hildebrand observed:

> In summary, economic theory tells us that if comparable worth is put into effect (1) unemployment rates for females will rise, (2) unemployment of females also will rise, (3) the major victims will be the poorest female workers, (4) welfare dependency will grow, (5) female youngsters will be large losers of job opportunities, and (6) there will be some withdrawal of discouraged women workers from the labor force, precisely because official policy, in the purported service of a peculiar concept of social justice, will have destroyed their jobs for them, despite their own efforts to be productive and self-supporting citizens.

Livernash at 106.[28]

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[28] Similar predictions of decrease in aggregate income, unemployment of women workers and disruption of the labor market have been made by Lindsay at 33-34, and Nelson, Opton & Wilson at 290-96 who also discussed the adverse effect that job comparability discrimination theories would have on affirmative action programs for women and their integration into the work force. The President of the International Ladies Garment Workers Union put the economic problems in this perspective:

> I'll be damned if I know a way to get the women more money. . . . The value of their work isn't set by theoretical principles but on the value of the work in the marketplace and in the face of competition from overseas, where garment workers make 30 cents an hour.

Address by S. Chaikin, President, ILGWU, AFL-CIO Annual Convention, Washington, D.C. (Nov. 15-20, 1979), quoted in *The New*

Similarly, job comparability discrimination theories could have a dramatic negative effect on collective bargaining. As Professor Herbert R. Northrup points out:

> Neither the EEOC nor any other government civil rights agency has ever demonstrated expertise in industrial relations or wage compensation, nor would they be acceptable arbiters to unions and managements. To have the EEOC or, for that matter, any government agency as the self-appointed determiner of job evaluation or wage levels, is certain to result in extensive controversy, litigations, and concomitant industrial strife. Moreover, the courts are not better suited in terms of expertise and are hardly more acceptable to the parties. What is being considered has the potential of drastically altering our system of collective bargaining, substantially increasing labor strife, dramatically raising labor costs, adding greatly to inflation, and worsening America's international competitive position.

Livernash at 133.[29]

Pay Push for Women, Bus. Week at 69 (Dec. 17, 1979). *See also The EEOC's Bold Foray into Job Evaluation*, Fortune at 58-59 (Sept. 11, 1978) (Ordering employers to pay the same wages for work of equal value "would certainly correct imbalances rapidly, but the economy would surely be much disrupted in the process. At the extreme, to raise the aggregate pay of the country's 27.3 million full-time working women high enough so that the median pay for women would equal that of men would add a staggering $150 billion a year to civilian payrolls.").

[29] Such an intrusion would thwart the Congressional policy of protecting the collective bargaining process from excessive government regulation. *See, e.g., H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970); *NLRB* v. *Ins. Agents' Int'l Union*, 361 U.S. 477 (1960); and *California Brewers Ass'n* v. *Bryant*; 100 S. Ct. 814. Because of this policy, the courts have little experience in analyzing and evaluating jobs and setting wage rates, much less in evaluating economic factors, such as the comparative strength of intra-union pressure groups, the market price and market demand for various skills, the economic cost to the operation of raising the wages of persons in one group or another, and many other factors. *See also Christensen* v. *Iowa*, 563 F.2d at 353.

The deliberations and judgment of Congress on this issue reflected in the Equal Pay Act and the Bennett Amendment provide no support for the proposition that courts enforcing federal wage discrimination legislation can be thrust into adjudicating claims regarding dissimilar jobs. Among Congress' reasons for adopting the more limited "equal work" concept was that it was less vague than the "comparable work" approach and thus would limit the role of federal regulators and the courts.

Of course, qualified females not only have an equal opportunity—assured by Title VII—to be hired for or bid into any job category, but under the "equal work" standard they also must be paid the same as males if they perform substantially equal jobs." [30] And "[s]ince wage discrimination cannot survive the end of job separation, the integration of the workforce means the end of such wage discrimination as may exist." Nelson, Opton & Wilson at 298.

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[30] An Equal Pay Act violation does not hinge upon a showing that the jobs are absolutely equal or identical. It is sufficient that they are "substantially equal." *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259; *Angelo* v. *Bacharach Instrument Co.*, 555 F.2d 1164. This interpretation prevents employers from creating artificial job classifications which, although not substantially different, might be used as a subterfuge to escape the requirements of the Equal Pay Act.

CONCLUSION

It would be contrary to clear Congressional intent, the rules of statutory construction and applicable legal precedent to permit the plaintiffs to draw the federal courts into the adjudication of wage rates of persons performing dissimilar jobs. The decision below could have serious economic and social consequences, which would upset the scheme established by Congress and entangle the judiciary in issues that would be difficult to resolve and almost impossible to manage. That approach was rejected by Congress and should be rejected by this Court.

Respectfully submitted,

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December 29, 1980

APPENDIX

The Amici Curiae subscribing to this brief are described as follows:

EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council (EEAC) is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices. Substantially all of EEAC's members, or their constituents, are private employers subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* (Title VII), and The Equal Pay Act, § 6(d) of the Fair Labor Standards Act, 29 U.S.C. § 206(d).

Because of its interest in sex-based compensation cases and the related construction of Title VII and the Equal Pay Act, EEAC filed a brief supporting the petition for rehearing in the Ninth Circuit below. EEAC's arguments were treated at length by the Ninth Circuit. EEAC also has filed amicus briefs in two other important cases in this area. *See Lemons* v. *City & County of Denver*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 42 U.S.L.W. 3211 (U.S. Oct. 7, 1980) (No. 80-82); and *IUE* v. *Westinghouse Electric Corp.*, 23 FEP Cases 588 (3d Cir. 1980), *pet. for reh'g denied*, October 29, 1980, *pet. for cert. pending*, Nos. 80-781 & 80-944.

EEAC also has participated before this Court in other significant Title VII cases. *See, e.g., California Brewers Association* v. *Bryant*, 100 S. Ct. 814 (1980); *Great American Federal Savings & Loan Association* v. *Novotny*, 99 S. Ct. 2345 (1979); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977).

INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION

The International Personnel Management Association (IPMA) is an organization representing 1,000 member agencies including civil service commissions, merit system boards, and personnel departments at the federal, state and local levels of government. The Association, which was established in 1973 by the consolidation of the Public Personnel Association (founded in 1906) and the Society for Personnel Administration (founded in 1937), represents over 55,000 individuals, primarily personnel professionals and personnel administrators in the public sector. IPMA attempts to foster and develop interest in sound personnel administration by providing a focus and forum for personnel professionals throughout the United States and abroad.

The International Personnel Management Association is totally committed to equity in wage administration. The Association believes that the Equal Pay Act of 1963 was carefully drafted by the United States Congress to mandate an equal pay for equal work standard, and that Congress specifically rejected use of the comparable worth standard as inherently impractical and unworkable. Further, the Association recognizes that wages are established not only through job evaluation methodologies but by supply and demand within the market place and by collective bargaining. In support of these beliefs, IPMA joins as an Amicus in the case at bar.

NATIONAL ASSOCIATION OF COUNTIES

The National Association of Counties (NACo) is a non-profit organization, founded in 1935, that represents the interests of its 1900 member counties and their elected and appointed officials. American county governments employ hundreds of thousands of people in public service jobs. They are committed to the principle of nondis-

criminatory employment practices. But they believe that new standards for evaluating employment practices, such as "comparable worth," should not be developed on a case-by-case basis through time-consuming and costly litigation, particularly in the absence of a manifest congressional intent to do so under Title VII of the Civil Rights Act.

NATIONAL LEAGUE OF CITIES

The National League of Cities (NLC) is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all, almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. The functions of NLC as authorized in its Bylaws include "the safeguarding of the interests, rights, and privileges of municipalities." It is in this latter capacity that NLC offers its view in the case at bar. City governments are committed to the principle of nondiscriminating employment practices. But whatever may be the intrinsic merits of "comparative worth" or other new ideas of equality, from the perspective of city governments it is disruptive, costly, wasteful and basically inappropriate to develop such novel concepts in the courts of the nation by means of perhaps thousands of suits against city government employers under Title VII of the Civil Rights Act. This is particularly the case when evidence is lacking that Congress either intended these results or provided statutory guidance to these ends.

THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION

The National Public Employer Labor Relations Association (NPELRA) is a national organization whose members are predominantly full-time city, county and

state government professionals involved in the implementation of employment and labor relations policies affecting over four million public employees. Its members come from all fifty states and are employed by jurisdictions with as few as 100 employees and as many as 200,000 employees.

NPELRA for the past ten years has been actively involved in the promotion of sound public policies and practices bearing on all facets of public sector employment relations, with special emphasis upon collective bargaining and equal employment opportunity matters.

NPELRA is especially concerned about the Ninth Circuit's broad interpretation of Title VII in this case. In particular, if the Ninth Circuit's view is sustained, the courts and the federal agencies charged with the enforcement of the civil rights laws would necessarily become involved in making decisions on the wages to be paid to millions of public employees, decisions which "[u]nder our democratic system of government . . . have been entrusted to elected officials who ultimately are responsible to the voters." *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 258 (1977) (Powell, J., concurring). *Cf.*, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).